IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Hazleton Creek Properties, LLC, Petitioner, v. Andrew Wheeler, Acting Administrator, United States Environmental Protection Agency, And United States Environmental Protection Agency Respondents.	)	No. 18-3665

RESPONDENTS' RESPONSE TO CLERK'S ORDER DATED DECEMBER 6, 2018

Respondents Andrew Wheeler, in his official capacity as Acting Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively "EPA") hereby file their response to the Order dated December 6, 2018, requesting that the parties address the Court's authority over Petitioner Hazleton Creek Properties, LLC' ("Hazleton's") December 6, 2018 petition for review. As discussed below, the Court lacks such authority.

The petition challenges the contents of a letter sent last September by an EPA regional office to Hazleton. The challenged letter is a preliminary communication regarding possible violations of the Toxic Substances Control Act ("TSCA"). The letter does not impose any obligations on Hazleton or otherwise have legal

consequences. Accordingly, the letter constitutes neither a final EPA "order" nor promulgated "rule" reviewable in this Court under the TSCA judicial review provision cited by Hazleton in its petition for review. *See* 15 U.S.C. 2618(a).

BACKGROUND

I. Statutory and Regulatory Background

A. TSCA and the Regulation of PCBs

Congress enacted Title I of TSCA in 1976 to address unreasonable risks to health or the environment associated with the manufacture, processing, distribution in commerce, use and disposal of certain chemical substances and mixtures. *See* 15 U.S.C. § 2601 et seq. Congress substantially amended TSCA Title I in 2016. Pub. L. No. 114-182 (June 22, 2016), but those amendments are generally beyond the scope of this suit.

As pertinent here, Section 6(e) of TSCA, 5 U.S.C. § 2605(e), addresses the class of chemicals known as polychlorinated biphenyls (PCBs). These chemicals pose a risk of potential cancer and other adverse effects to humans. In view of these risks, Congress generally prohibited the manufacture, processing, and distribution in commerce of PCBs, and the use of PCBs "in any manner other than in a totally enclosed manner." *See* TSCA section 6(e)(2)(A), (3), 15 U.S.C. § 2605(e)(2)(A), (3). Congress, however, authorized EPA to issue regulations authorizing use of PCBs in a manner other than a totally enclosed manner if EPA finds that such use "will not

present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(e)(2)(B). Congress further directed EPA to "promulgate rules to . . . prescribe methods for the disposal of [PCBs]." 15 U.S.C. § 2605(e)(1)(A). Consistent with its section 6(e) authority, EPA has promulgated PCB regulations, which include provisions that cover the use and disposal of PCBs. These regulations are published in the Code of Federal Regulations at 40 CFR Part 761. *See, e.g.*, 40 CFR §§ 761.20 (setting forth prohibitions on, and exceptions to prohibitions on, manufacture, processing, distribution in commerce, and use of PCBs) and 761.30 (authorizing non-totally-enclosed uses of PCBs) and 40 CFR Part 761, Subpart D at §§ 761.50 – 761.79 (governing the storage and disposal of PCBs).

B. EPA Authority to Enforce TSCA PCB Violations

Persons who violate PCB regulations are subject to civil administrative penalties. Pursuant to TSCA section 15(a), 15 U.S.C. § 2614(a), it is unlawful for any person to "fail or refuse to comply with any requirement of [TSCA Title I] or any rule promulgated, or order issued, or consent agreement entered into under [Title I]." Pursuant to TSCA section 16(a)(1), 15 U.S.C. § 2615(a)(1), "[a]ny person who violates a provision of section 2614 . . . of this title shall be liable to the United States for a civil penalty . . . ." Pursuant to TSCA section 16(a)(2), 15 U.S.C. § 2615(a)(2):

> "[a] civil penalty for a violation of section 2614 . . . of this title shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing . . . . Before issuing such an order, the Administrator shall

> give written notice to the person to be assessed a civil penalty under such order of the Administrator's proposal to issue such order and provide such person an opportunity to request, within 15 days of the date the notice is received by such person, such a hearing on the order."

TSCA section 16(a) and EPA's implementing regulations at 40 C.F.R. Part 22 establish a process for the assessment of such penalties and judicial review. Under TSCA section 16, before assessing a penalty, EPA must first give written notice to the affected party and provide an opportunity for that party to request an administrative hearing. 15 U.S.C. § 2615(a)(2)(A).

EPA's section 16 implementing regulations more specifically provide that where EPA has reason to believe that a person has violated TSCA regulations, EPA may file an administrative complaint setting forth the basis for a proposed penalty. 40 C.F.R. § 22.13. If an answer to such a complaint is filed, the matter is assigned to an administrative law judge who acts as the "Presiding Officer." 40 C.F.R. § 22.21. Upon request of the respondent in the answer to the complaint, EPA must then hold a hearing. Id. § 22.15(c). Even if a hearing is not requested, a hearing may nonetheless be held if issues appropriate for adjudication are raised in the answer. Id. If the Presiding Officer determines that a violation has occurred, the Officer will issue an initial decision containing, among other information, a recommended civil penalty assessment. Id. § 22.27(a). The Presiding Officer will determine the dollar amount of a recommended civil penalty in accordance with the criteria set forth in TSCA section

16 and the Agency's civil penalty guidelines. Id. § 22.27(b). Any party may appeal an adverse ruling or order of the Presiding Officer to EPA's Environmental Appeals Board ("EAB"). 40 C.F.R. § 22.30. The EAB may adopt, modify, or set aside the findings and conclusions contained in the Presiding Officer's decision. Id. § 22.31(a).

A final penalty order issued following the procedures outlined above "constitutes the final Agency action in a proceeding," Id. § 22.31(a). Under TSCA section 16(a)(3), an affected party that requested a hearing may then seek judicial review of such final agency action upon timely petition to the United States Court of Appeals for the District of Columbia Circuit or to the court of appeals for the circuit in which the petitioner resides or conducts business. 15 U.S.C. § 2615(a)(3).

Beyond the administrative penalty authority described above, EPA may seek injunctive relief to restrain violations of the PCB regulations through civil actions. Such enforcement actions must be brought in the United States district court where the violation occurred or where the defendant is found or transacts business. 15 U.S.C. § 2616.

C. The TSCA Section 19 Judicial Review Provision

TSCA subsections 19(a)(1)(A) and (B), 15 U.S.C. § 2618(a)(1)(A) and (B)—which are invoked by Hazleton as the bases for jurisdiction here—provide for judicial review in the courts of appeals of certain "promulgated" "rule[s]" and "order[s]" under TSCA.

II. Factual Background

Petitioner Hazleton is redeveloping an abandoned mining site in Hazleton, Pennsylvania. On April 24, 2018, EPA Region III, sent a "Notice of Noncompliance" ("NON") to Hazleton advising it of EPA Region III's "preliminary determination" that Hazleton had violated EPA's regulations by using PCB-containing soils as clean fill and/or beneficial use construction material at the mining site, as well as at one additional site in Moosic, Pennsylvania. *See* Hazleton Response to December 6, 2018 Order ("Hazleton Response"), Exhibit B. EPA Region III requested certain information pertaining to the alleged violations and indicated that absent a timely response to the notice it "may issue an administrative complaint for the assessment of civil penalties." Hazleton then provided a "preliminary response" to EPA's notice in a letter dated May 29, 2018, and a "supplemental response" to the notice by letter dated June 8, 2018. See Hazleton Response, Exhibits C and D. EPA Region III responded to these two responses in a subsequent letter dated September 26, 2018, which is the subject of this petition for review. *See* Exhibit A.

In the challenged September 26 letter, EPA Region III explains that the notice of noncompliance sent in April was a "warning letter that EPA issues to alert parties of actual or potential violations." *Id.* The letter further notes that EPA's implementing regulations at 40 C.F.R. Part 761 impose limitations on, and requirements for, the use of PCB-containing materials. *Id.* The letter states that "[n]o corrective action is necessary by your company at this time," but cautions that "EPA

reserves the right to investigate this matter further and to take any and all enforcement or other response actions which may be appropriate, including a reconsideration of the information provided in your response to the NON." *Id.* The letter further requests that Hazleton "[p]lease ensure your facility takes all actions in preventing future violations." *Id.*

The letter calls specific attention to EPA's regulation at 761.20, which implements TSCA section 6(e) by, among other things, setting forth prohibitions on the use of PCBs pursuant to TSCA section 6(e)(2). The letter states that "further receipt of any PCB-containing materials with PCB concentrations equal to or greater than 2 ppm would constitute a violation of the TSCA PCB regulations." *Id.* To date, no administrative complaint related to the matters addressed in the April NON and September 2018 letter has been filed by EPA.

On December 6, 2018, Hazleton filed a petition in this Court seeking review of the September 26, 2018 letter. By order dated December 6, 2018, this Court directed the parties to address this Court's authority over the petition. ECF Doc. No. 003113103354. In its response to that order (ECF Doc. No. 003113115699), Hazleton contends that this Court has jurisdiction pursuant to section 19(a) of TSCA, 15 U.S.C. § 2618(a). More specifically, Hazleton contends that the September letter either (a) constitutes a final "order" that is reviewable under subsection 19(a)(1)(B), or (b) constitutes a promulgated "rule" that is reviewable under subsection 19(a)(1)(A). *Id.*

DISCUSSION

Sometimes, as is the case here, "a letter is just a letter." *Owner-Operator Independent Drivers Ass'n, Inc. v. Ferro*, 554 Fed. Appx. 1 (D.C. Cir. 2014). The September 2018 letter sent to Hazleton by an EPA regional office is a preliminary communication regarding a potential enforcement matter that does not impose any obligations on Hazleton or otherwise have legal consequences. Thus, it is neither a reviewable final agency "order" nor a promulgated "rule" within the meaning of section 19 of TSCA, 15 U.S.C. § 2618.

Should EPA ultimately proceed with further enforcement action related to the matters addressed in the letter, Hazleton would have judicial and administrative remedies. For example, should EPA commence an administrative penalty action, Hazleton would have the right to request an administrative hearing and the ability to appeal an adverse initial decision by a presiding officer to the Environmental Appeals Board. Hazleton could also challenge any final administrative penalty through a petition for review in the United States Court of Appeals. Alternatively, should EPA elect to pursue a civil action to restrain ongoing violations, Hazleton would have an opportunity to contest the alleged violations before a federal district court. While these actions would mark the consummation of the agency's decisionmaking process with respect to the existence of a violation and would create legal consequences for Hazleton, the September 2018 preliminary communication does neither. Therefore, judicial review is premature.

I. The Letter is Neither a Final Order Nor Rule.

TSCA Section 19(a)(1), 15 U.S.C. § 2618(a)(1), provides for this Court's review of certain final "orders" and "promulgated" "rules."[1] As a general matter, two conditions must both be satisfied for agency action to be final. First, the action must mark the consummation of the agency's decision-making process and not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).[2] The challenged September 2018 EPA letter to Hazleton (*see* Exhibit A) does not meet either prong of the *Bennett* finality test.

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[1] The APA, 5 U.S.C. § 551, defines "order" as "the whole or part of a *final* disposition, whether affirmative, negative injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing" (emphasis added). *See Aerospace, Inc. v. Slater*, 142 F.3d 572 (3d Cir. 1988) (considering the APA definition of the term "order" where that term was not otherwise defined in a statute).

[2] *See also Ocean County Landfill v. EPA*, 631 F.3d 652 (3d. Cir. 2011) (amplifying on the two-prong *Bennett* test and identifying five factors to determine whether agency action is final, including (1) whether the decision represents the agency's definitive position on the question; (2) whether the decision has the status of law with the expectation of immediate compliance; (3) whether the decision has immediate impact on the day-to-day operations of the party seeking review; (4) whether the decision involves a pure question of law that does not require further factual development; and (5) whether immediate judicial review would speed enforcement of the relevant act).

A. The Letter is Not a Final Order

1. The Letter Does Not Consummate an Enforcement Proceeding.

The September 2018 letter is not a final order. To begin with, the September 2018 letter does not constitute the consummation of EPA's decisionmaking process related to potential regulatory violations. The letter, by its own terms, does not contain any final resolution of any of the potential violations first identified in the April 2018 notice of noncompliance. Nor does the September letter commit EPA to any particular course of enforcement action. To the contrary, EPA expressly reserved the right to investigate the potential violations further and to take "any and all enforcement . . . actions which may be appropriate." Exhibit A at 2. Thus, the communication does not resolve potential violations and conclude an enforcement proceeding. Instead, like the notice of noncompliance that preceded it, the letter serves as a precursor to possible future enforcement proceedings, which could take the form of an administrative complaint seeking a penalty under 15 U.S.C. § 2615 or a judicial enforcement action to restrain violations under 15 U.S.C. § 2616.

The relevant provisions of TSCA and EPA's implementing regulations underscore the preliminary nature of this kind of warning letter. *See Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (noting that the decision-making processes set out in an agency's governing statutes and regulations is highly salient to determining whether an action represents the culmination of that agency's

consideration of an issue). TSCA section 16, 15 U.S.C. § 2615, and EPA's implementing regulations at 40 C.F.R. Part 22, lay out a comprehensive administrative process that must be completed *prior* to any "final" administrative penalty action. As these provisions make clear, Hazleton will have an opportunity for an evidentiary hearing prior to the assessment of any administrative penalty, 40 C.F.R. § 22.15(c), as well as the right to an administrative appeal. 40 C.F.R. § 22.30. Further, TSCA section 16(a)(3), 15 U.S.C. § 2615(a)(3), provides that judicial review is available in the court of appeals only *after* these administrative remedies are exhausted, also indicating that the agency's decisionmaking process does not conclude until that point.

Warning letters such as this that notify affected parties of potential violations of TSCA and identify ways in which compliance can be assured do not allow parties to avoid the judicial review mechanisms specified by Congress. They are tools intended solely as an initial and preliminary enforcement step. EPA believes it is beneficial in many cases to make early contact with a potential violator to apprise an entity of the agency's preliminary views on potential enforcement issues. Such early communication can enhance transparency and facilitate discussions between a company and EPA on any areas of disagreement, potentially avoiding the need for further agency enforcement activity. But such preliminary communications do not mark the consummation of an agency's decision-making process. *See Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (informal warning letter communicating FDA's position on a matter and that requests corrective actions

is not reviewable where it does not commit FDA to taking enforcement action). *See also Luminant Generation Co. LLC v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014) (a Clean Air Act notice of violation is not a final agency action because it "does not commit the EPA to any particular course of action" and because "the statute makes clear the intermediate, inconclusive nature of issuing a notice"). Here, as in *Luminant*, EPA has not committed itself to any particular course of enforcement action, and the statute makes clear that a final administrative order issuing a penalty will occur only following an opportunity for a public hearing. *See* 15 U.S.C. § 2615(a)(3).

Moreover, even if the challenged letter were to be considered an enforcement "order" (and it is not), it could not have been an order issued under TSCA section 6(e), 15 U.S.C. § 2605(e), as Hazelton claims. *See* Hazleton Response at 5. TSCA section 6(e) does not provide EPA any authority to issue "orders." Enforcement orders under TSCA are authorized only under TSCA section 16, 15 U.S.C. § 2615, following an opportunity for hearing. Therefore, there is no such thing as a TSCA section 6(e) enforcement order.

In addition, Congress expressly provided for court of appeals review of final penalty orders in a different provision of TSCA—section 16(a)(3), 15 U.S.C. § 2615(a)(3). Thus, the judicial review provision at TSCA section 19(a)(1) cited by Hazleton, 15 U.S.C. § 2618(a)(1), does not even apply to the review of orders in enforcement proceedings. If enforcement orders were reviewable under Section 19(a)(1), as Hazleton suggests, then the separate judicial review mechanism for final

penalty orders set forth in section 2615(a)(3) would be entirely superfluous. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."). Nor would Congress have provided in section 2618(a)(1) that the court of appeals' "exclusive jurisdiction" does not extend to review of orders "in an enforcement proceeding" if Congress had actually intended for section 2615(a)(1) to encompass enforcement orders.

Furthermore, Hazleton's failure to exhaust administrative remedies, standing alone, warrants dismissal. *See Bethlehem Steel v. EPA*, 669 F.2d 903, 909 (3d Cir. 1982) (dismissing challenge to EPA notice of noncompliance with emission rate limitation because company had not exhausted administrative remedies, which would either moot need for judicial review or result in better informed judicial review because court would have benefit of findings reached after evidentiary hearing). As in *Bethlehem*, the company's dispute with EPA will come to an end if Hazleton prevails at an agency hearing, as provided in TSCA section 16(a), 15 U.S.C. § 2615(a). In addition, as in *Bethelehem*, if Hazleton should not prevail at a hearing and then appeal to this Court, the Court's overall review "will be better informed because it will have the benefit of findings reached after an evidentiary hearing on technical matters." *Id.*

2. The Letter Is Not an Order Because it Does Not Determine Legal Rights or Obligations.

The September 2018 letter also does not meet the second prong of the *Bennett* finality test. TSCA and EPA's duly-promulgated implementing regulations concerning the use and disposal of PCBs, not the challenged letter, determine rights or obligations related to use and disposal. The letter does not create or alter rights or obligations under TSCA, including legal penalties or sanctions. *Cf. Luminant*, 757 F.3d at 442 (holding that a notice of violation issued under the Clean Air Act does not itself determine rights or obligations). Any civil penalties would be assessed only following the process for issuance of administrative civil penalty orders outlined in TSCA section 16 and 40 CFR part 22, described in detail above. Nor does the letter purport to compel Hazleton to take any particular actions. Indeed, the letter makes clear that "[n]o corrective action is necessary by your company at this time." Exhibit A at 1.

The letter requests very generally that the company "please ensure that your facility takes all actions in preventing future violations." *Id.* But this exhortation that the company avoid future violations of existing regulations does not itself impose any separate or free-standing legal obligation above and beyond what was already required by those regulations. Hazleton was already under an obligation to remain in compliance with TSCA PCB regulations, and the letter does not affect this obligation.

To be sure, the letter, and the correspondence to which it responds, reflect that there may presently be some areas of disagreement between Hazleton and EPA's regional office as to whether specific activities undertaken or planned by Hazleton

comport with EPA's existing regulations. For example, Hazleton appears to dispute the letter's assertion that "further receipt of any PCB-containing materials with PCB concentrations equal to or greater than 2 ppm" at Hazleton's facility would constitute a violation of the TSCA PCB regulations. *See* Exhibit A at 1; Hazleton Response at 6. But the fact that Hazleton may disagree with certain preliminary interpretations of EPA's regulations—as applied to Hazleton's facility—set forth in the letter does not mean that those interpretations are final and have some independent force of law. Should EPA pursue further enforcement action based on any preliminary interpretations set forth in the letter, as may be applied to Hazleton's facility, Hazleton will have an opportunity to contest those interpretations—at the appropriate time, and as applied to particular facts that are further developed through additional administrative proceedings. The statute specifies the proper timing of such judicial review: Judicial review is available when either (a) EPA issues a final administrative penalty under TSCA section 16, 15 U.S.C. § 2615, or (b) EPA brings a judicial enforcement action under TSCA section 17, 15 U.S.C. § 2616, to restrain violations. In the meantime, EPA has not "closed the book" (*see* Hazleton Response at 6) on its investigation of the issue or made a "final" legal decision.

The challenged letter is also readily distinguishable from the sort of compliance order deemed reviewable by the Supreme Court in *Sackett v. EPA*, 566 U.S. 120 (2012). In *Sackett*, a landowner received a final administrative compliance order issued and authorized pursuant to section 309 of the Clean Water Act. 33 U.S.C. § 1319.

Under the specific terms of that statute, that compliance order had immediate legal consequences. In particular, the landowner faced additional civil penalties if it failed to take remediation steps consistent with the terms of the order. But TSCA does not have a comparable enforcement structure. As discussed above, final administrative enforcement orders under TSCA section 16 issue only following an opportunity for hearing. Here, no such hearing has occurred and no final order has been issued. Until there is a final order, there is nothing ripe for judicial review. Under the terms of the statute, preliminary EPA enforcement communications related to potential violations of TSCA do not have any legal consequences.[3]

B. The Letter is Not a Final Promulgated Rule

For similar reasons, the letter does not qualify as a final "rule" within the meaning of TSCA Section 19(a)(1), 15 U.S.C. §. 2618(a)(1). To begin with, the terms of Section 19 make clear that direct appellate review of "rules" is limited to final "promulgated" rules (*i.e.* legislative rules"), as opposed to informal interpretive rules or statements of policy. *See* 15 U.S.C. § 2618(a) and (c) (referring to "promulgated" rules and "the rulemaking record," and providing that the standard of review shall be "substantial evidence in the rulemaking record.").[4] A legislative rule is an agency

[3] Similarly, the letter is readily distinguishable from the Clean Water Act jurisdictional determination at issue in *United States Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), which had legal consequences by denying respondent a five-year safe harbor from enforcement.

[4] Accordingly, contrary to Hazleton's assertion (Hazleton Response at 10), the Court's jurisdiction does not turn on whether statements within the letter fall within the

action that imposes legally binding obligations or prohibitions on regulated parties and that would be the basis for an enforcement action for violations of those obligations or requirements. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2015). In contrast, an agency action that "merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion . . . under some extant statute or rule—is a statement of policy." *Id.* Because statements of policy do not themselves impose legal obligations or otherwise have legal consequences, they do not meet the second prong of the *Bennett* finality test and are not judicially reviewable "final" agency actions. *Id* at 250-52.

The most important factor in determining whether something is a statement of policy or a legislative rule is "the actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d at 243. Here, the letter in question has no actual legal impact on Hazleton or any other regulated entities. As discussed above, the letter does not, and could not, establish EPA's final adjudication of Hazleton's compliance with TSCA, because under the

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relatively broad definition of the term "rule" under the Administrative Procedure Act. 5 U.S.C. § 551(4). The broad APA definition of "rule" was developed for purposes other than identifying the scope of judicial review, and encompasses several types of agency action—such as interpretive rules and guidance—which lack binding impact and do not constitute "promulgated" rules within the meaning of TSCA section 19(a), 15 U.S.C. § 2618(a).

structure of the statute such a final EPA adjudication occurs at the *conclusion* of the TSCA Section 16 process with the issuance of a final "order."[5]

Hazleton points to the disputed statement in the letter that "future receipt of any PCB-containing materials with PCB concentrations equal to or greater than 2 ppm would constitute a violation of the TSCA PCB regulation." Hazleton response at 11. But that interpretive statement does not mark the consummation of EPA's enforcement decision-making process and does not establish binding obligations on Hazleton or anyone else. The statement preliminarily interprets EPA's preexisting regulations as applied to Hazleton's specific factual circumstances, but it does not do so in any final manner. In the event that EPA should pursue further administrative enforcement action based on the preliminary interpretation, Hazleton will be free to request an administrative hearing and contest the interpretation (which again, is not final). If the interpretation were then ultimately retained and applied in any *final* EPA administrative order, that final order would be reviewable in this Court at the appropriate time under TSCA section 16(a)(3).[6]

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[5] As discussed above, the letter also does not mark the consummation of EPA's decision-making and meet the first *Bennett* prong because the governing statute lays out a detailed administrative process that must occur before EPA issues a "final" decision.

[6] We further note that if Hazleton could challenge under section 19 this kind of preliminary enforcement statement as a binding "rule," this would allow parties to readily circumvent the need to exhaust administrative remedies under section 16 and adhere to the limitations on judicial review therein.

Also underscoring that the letter is not a "promulgated" rule or intended to create a binding norm, EPA did not publish the letter in the Federal Register or Code of Federal Regulations. *See American Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996) (identifying whether the challenged document was published in the Federal Register or the Code of Federal Regulations as a relevant factor in determining whether a document is a reviewable "legislative rule"). *See also Gatter v. Nimmo*, 672 F.2d 343, 347 (3d Cir. 1982) (interpretive rules and statements of policy not published in the Federal Register and not promulgated with the procedural requirements for rulemaking are non-substantive and not judicially enforceable). In sort, the letter is not intended to be a "promulgated rule, and is not one. It is a preliminary enforcement communication. Hazleton will have an opportunity to contest any final enforcement action at the appropriate time.

CONCLUSION

The challenged letter is neither a final order nor a final promulgated rule. Therefore, this Court lacks authority over the petition for review, and the petition for review should be dismissed.

Respectfully submitted,

ADD SIGNATURE BLOCK

DATED: February ____, 2019